APPENDIX A

TODD SHIPYARDS CORPORATION
& the Travelers Insurance Company,
Petitioners,

v.

Norman C. ALLAN, Respondent.

and

Director, Office of Workers' Compensation Programs, United States Department of Labor, Real Party in Interest.

No. 80-7512.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 7, 1981.

Decided Jan. 22, 1982.

Petition for Review of a Decision and Order from the Benefits Review Board, United States Department of Labor.

Before KILKENNY and GOODWIN, Circuit Judges, and TANNER,* District Judge.

*The Honorable Jack E. Tanner, United States District Judge for the Western District of Washington, sitting by designation.

GOODWIN, Circuit Judge.

Todd Shipyards appeals from a Benefits Review Board order affirming an award of 25 percent permanent partial disability pursuant to §§ 8(c)(21) and 8(h) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 908(c)(21) and 908(h).

The dispositive issues are: (1) whether the Board erred in reversing the administrative law judge's initial finding that Norman Allan's claim was time-barred, and (2) whether substantial evidence supports the administrative law judge's determination that Allan suffered a 25 percent permanent partial disability.

On December 9, 1971, during the course of his employment, Allan, a shipwright, was injured when a piece of metal fell on his neck and shoulder. Allan experienced pain and dizziness, but continued to work the rest of the day.

The next day, his employer, Todd Shipyards, referred him to Dr. Irving Tobin, an orthopedist. Dr. Tobin diagnosed Allan's condition as a "post occipital headache" and "cervical myosis". Dr. Tobin told Allan the X-rays were normal and that Allan had a bad bruise "which would go away in time." Dr. Tobin gave Allan a prescription for pain and released him for work. Allan went back to work but the headaches and neck pain persisted. In April or May 1973, the neck pain got worse and Allan developed pain in his right arm. In July 1973, he went back to see Dr. Tobin who told him again that he had nothing more than a bad bruise.

In November 1973, X-rays taken by Dr. Tobin revealed a change between the fifth and sixth vertebrae. Dr. Tobin referred Allan to a neurosurgeon, Dr. John Gibson, who diagnosed his condition as progressive

cervical spondylosis initiated by the earlier accident. In January 1974, Allan had an anterior disc removal and fusion. On May 17, 1974, Allan returned to work. Allan filed his claim April 5, 1974.

After a hearing, an administrative law judge denied Allan's claim as time-barred under § 13(a) of the Act, 33 U.S.C. § 913(a). The Benefits Review Board reversed this ruling. On remand, the administrative law judge determined that Allan had suffered a 25 per cent permanent partial disability. The Benefits Review Board affirmed. This petition followed.

A. Statute of Limitations.

Two versions of § 13(a), 33 U.S.C. § 913(a), have been at issue in this case. At the time of Allan's injury, § 13(a) read in material part as follows:

> "The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury . . . ."

In 1972, § 13(a) was amended as follows:

> "Except as otherwise provided in this section, the right to compensation for disability or death under this Chapter shall be barred unless a claim therefor is filed within one year after the injury or death . . . The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment. (Amendatory language is underlined.)

[1,2] The administrative law judge applied the version of § 13(a) that had been in effect at the time of Allan's accident. The Board applied the amended version of § 13(a) to Allan's claim. The Board adopted the reasoning of Cooper Stevedoring of LA., Inc. v. Washington, 556 F.2d 268, 274 (5th Cir.), reh. denied, 560 F.2d 1023 (1977). In Cooper Stevedoring, the claimant's accident occurred a few months prior to the effective date of the amendment of § 13(a). Nonetheless, the

Fifth Circuit found that the claim was covered by the amended version of § 13(a). The amendment was procedural and therefore said to apply to pending claims. The remedial statute was read liberally to "best effectuate" the Congressional purpose. 556 F.2d at 272. See Whirlpool Corp. v. Marshall, 445 U.S. 1, 13, 100 S.Ct. 883, 891, 63 L.Ed.2d 154 (1980). We agree that the amended version of § 13(a) applies to Allan's claim. The Board was correct in reversing the administrative law judge. Todd argues that the amendment was directed toward latent injuries and occupational diseases, and thus should have no effect on Allan's "traumatic injury." The plain wording of the statute belies any Congressional intention that the amendment be read so narrowly.

[3] Todd also argues that even if the amended version of § 13(a) applies to

Allan, the claim is still untimely. The amended portion of § 13(a) states that the statute runs when the employee knows or should know "of the relationship between the injury or death and the employment." 33 U.S.C. § 913(a). Todd argues that there is substantial evidence in the record to support the administrative law judge's finding that because Allan continued to suffer headaches and pain during the period between the accident and the surgery, Allan knew, or should have known, that the pain was caused by the accident.

The Board correctly overturned that decision. Allan was told several times by Dr. Tobin that his injury was only a bad bruise. Even though he had recurrent pain and dizziness, he tried to keep working. He was not aware that he suffered a compensable injury until a second set of X-rays revealed degenerated cervical discs

in November 1973. Following Stancil v. Massey, 436 F.2d 274, 277 (D.C. Cir. 1970), the Board found that Allan was not "injured" for purposes of the statute of limitations until "he became aware of the full character, extent, and impact of the harm done to him." Allan worked until his surgery in January 1974. Only in November 1973 did Allan know that there was an injury in the sense contemplated by § 13(a)--an impairment of earning power. Under this standard, the statute of limitations did not begin to run until November 1973. Allan filed in April 1974. The claim was not time-barred.

B. Partial Permanent Disability.

[4] Under §§ 8(c)(21) and 8(h), 33 U.S.C. §§ 908(c)(21) and 908(h), the administrative law judge on remand found that Allan had suffered a 25 per cent partial permanent disability.

Allan's claim falls under § 8(c)(21), 33 U.S.C. § 908(c)(21) because such injuries are unscheduled injuries. Section 8(c)(21) provides:

> "(21) Other cases: In all other cases in this class of disability the compensation shall be 66-2/3 per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest."

Section 8(h), 33 U.S.C. § 908(h), indicates how wage-earning capacity in cases of partial disability is determined:

> "(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning

> capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future."

[5] After recovery from surgery, Allan returned to hs job as quarterman. He had been promoted to this position in November 1973 after the accident but before the surgery. His actual wages were higher than before the accident. The administrative law judge must determine that actual wages do not fairly represent wage-earning capacity before inquiring into other § 8(h) factors.

The administrative law judge found that Allan was still disabled after the surgery. Uncontradicted testimony by Dr. Burrell indicated that Allan sustained a 25

per cent loss of function in each arm and 25 per cent whole body standard. He could not lift more than 25 pounds. A vocational expert testified that with this disability Allan could not perform his previous jobs. He could work only at jobs that could be performed by a worker with his disability.

[6, 7] The administrative law judge then determined that Allan's post-injury earnings do not fairly represent his wage-earning capacity because his disabilities make it unlikely that he could compete on the open market. The shipbuilding industry often is "cyclical," and it is conceivable that Allan might be demoted into a job requiring more physical work than his present job. As a result of his injury Allan would not be able to perform jobs that require greater tool use and more physical activity. Section 8(h) allows the administrative law judge to consider the

future effects of a disability. Hole v. Miami Shipyards Corp., 640 F.2d 769, 772 (5th Cir. 1981); Lumber Casualty Mutual Insurance Co. v. O'Keeffe, 217 F.2d 720, 723 (2d Cir. 1954); Hughes v. Litton Systems, Inc., 6 Benefits Review Board Service 301 (BRB 1977). Higher post-injury wages do not preclude compensation if the claimant actually suffered a loss of wage-earning capacity. Portland Stevedoring Co. v. Johnson, 442 F.2d 411 (9th Cir. 1971); Collins v. Todd Shipyards, 9 Benefits Review Board Service 1015 (BRB 1979).

CONCLUSION

Allan's claim was not time-barred under the 1972 amendment to § 13(a), 33 U.S.C. § 913(a). The decision of the Board reversing the administrative law judge's on that point is affirmed. Substantial evidence supports the second administrative law judge's finding that Allan suffered a

25 per cent permanent partial disability under §§ 8(c)(21) and 8(h) of the Act, 33 U.S.C. §§ 908(c)(21) and 908(h).

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD SHIPYARDS CORPORATION & THE TRAVELERS INSURANCE COMPANY, Petitioners, v. NORMAN C. ALLAN, Respondent. and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Party in Interest.	No. 80-7511 ORDER

MARCH 25, 1982

Before: KILKENNY and GOODWIN, Circuit Judges, and TANNER*, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no

judge of the court has requested a vote on the suggestion for en banc rehearing. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*The Honorable Jack E. Tanner, United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX C

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

In the Matter of	:	
NORMAN C. ALLAN Claimant	:	
v.	:	Case No. 74-LHCA-291
TODD SHIPYARDS CORPORATION Employer	:	Formerly No. 14-15946
THE TRAVELERS INSURANCE COMPANY Carrier	:	

Dated: January 20, 1975

Filed: January 27, 1975

Before: FRANK W. VANDERHEYDEN
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901 et seq. (hereinafter Act) and the Rules and Regulations promulgated thereunder.

All parties were represented by counsel at a hearing held before me on October 17, 1974, in Seattle, Washington. They were accorded full opportunity to be heard, to adduce evidence, to examine witnesses and to file proposed findings and briefs.

The matter involves two issues. First, whether or not the employee filed his claim timely as required by Section 13(a) of the Act. The second question is the extent of the employee's disability. It was the intention of the latter's counsel to submit a post-hearing deposition from a physician dealing with the employee's disability. At the hearing, however, it developed that this doctor would be out of the country for several months. The parties agreed that the resolution of the Section 13 issue was basic and of a jurisdictional nature. They requested (Tr.

127-131) that the question of timely filing be resolved first and that the record remain open to receive evidence on the disability issue should it be determined the claim was not barred under Section 13(a). In light of the jurisdictional character of Section 13(a) and the extenuating circumstances involving the absence of medical testimony concerning the employee's disability, the undersigned agreed to decide the issue of timely filing first.

On the basis of the entire record, I make the following Findings of Fact, Conclusion of Law and Order:

Findings of Fact and Conclusions of Law

I.

At the hearing the parties stipulated, and I so find, the following:

1. The date of the accident and/or injury of Norman G. Allan, (hereinafter Claimant) was December 9, 1971; that

2. Todd Shipyards Corporation (hereinafter Employer) received timely notice of Claimant's injury; that

3. The injury arose out of and in the course of Claimant's employment; that

4. Claimant was disabled totally from January 2, 1974, until March 17, 1974, as a result of the injury sustained in the accident; that

5. All medical bills arising from the injury have been paid by the Employer.

Claimant was 41 years of age at the time of the hearing, married and has three grown children. He is 6 feet, 3 inches of height, weighs 260 pounds and is left-handed. Claimant finished the eighth grade of school and went to work. He entered the Air Forces subsequently and his occupation in the Service was that of a fireman.

While in the Armed Forces he completed high school. His entire adult life has been spent in occupations requiring heavy labor such as construction carpentry, construction labor and sawmill work. Claimant's occupation at the time of hearing was that of a shipwright-quarterman for the Employer and he has been a shipwright since April 1968. This work is of a heavy manual nature involving the installation of paneling and planking in ships. Sometime in 1971 Claimant was made a leadman which job was to get material to the crew and keep the latter going. Whether as a leadman or quarterman there are times when Claimant has to engage in manual labor to help as needed.

Claimant has worked for Employer, though not continuously, since 1968, and depending upon available work his title was either journeyman, leadman or quarterman.

In November 1973 Claimant was promoted to quarterman and was employed in this capacity at the time of the hearing.

On December 9, 1971, while working as a leadman in the hold of a ship, Claimant was struck on his fiberglass hardhat by a 10 pound piece of steel plate which fell from the deck of ship. He was not rendered unconscious, though he saw "stars" and got dizzy. The steel bounced off Claimant's hardhat and struck him on the right shoulder. He had headaches and in about 15 minutes he went to the Employer's First Aid facilities where he was given aspirin for the headache and advised to return the next day to see a doctor if he was still being bothered. Claimant returned to his duties and worked the rest of the day. His neck also began to bother him. The pain in the right side of Claimant's neck continued during the day and night and when

returned to work the next morning the neck and head pains persisted. He went to First Aid where the "yard Doctor" sent Claimant immediately to see Dr. Irving Tobin, which doctor conducted an examination, including X-rays and diagnosed Claimant's condition as post contusion occipital headache and cervical myositis. X-rays of the cervical spine were normal and Claimant was to return "p.r.n.," (pro re nata or "according to the circumstances"). (C-10) Dr. Tobin gave Claimant a prescription for medication to relieve headaches and pain.

The record is unclear whether Claimant went back to work after this visit to Dr. Tobin or returned to work and then was sent home. In any event, aside from visits of a half-day or so to Dr. Tobin and Dr. John C. Gibson, below mentioned, and his period of hospitalization, Claimant did not miss any time from work. On December 13, 1971, the

Employer filed BEC Form 202a, - Employer's First Report of Injury or Occupational Illness.

The yard doctor refilled Claimant's medication in March 1972. However, his neck bothered him continually and he was also having headaches. Claimant may have mentioned his problem to his family physician, Dr. Martin, who he sees about once a year but this doctor gave no advice concerning his neck. Claimant next saw Dr. Tobin in July 1973. Claimant's right arm also began to give him discomfort about October 1973. On November 11, 1973, Claimant visited Dr. Tobin again where additional X-rays of cervical spine were taken and compared with those taken on the first visit. The revealed a change in the appearance between C5-C6. A diagnosis of a degenerative disc was explained to Claimant and he was advised that it may well be the

outcome of the injury of December 1971. The possibility of surgical intervention was mentioned but not recommended at that time. On December 10, 1973, Claimant saw Dr. Tobin again where he possibility of surgery was examined anew but Claimant did not wish to consider such until after the first of the year.

At no time in Claimant's visits to Dr. Tobin did the latter ever indicate that the injuries were not attributable to the accident. The doctor referred Claimant to Dr. John C. Gibson, who submitted a report to Dr. Tobin dated December 13, 1973, whose diagnosis was progressive cervical spondylosis brought about by the blow to Claimant's head some two years previously. In his report Dr. Gibson related in part that the neck pain "waxed and waved and [Claimant] took analgesics for it over the ensuing two years without much change.

However, in approximately April or May 1973 he noted that the pain in the neck was getting worse and was radiating down into his right arm."

Also on December 1973, after Claimant saw Dr. Gibson, he had a telephone conversation with Mr. William Decker of the Office of Workmen's Compensation Programs of the Department of Labor. Claimant in anticipation of surgery had inquired concerning whether or not he was entitled to compensation. Claimant did not discuss with Mr. Decker the filing of a written claim nor did the latter suggest Claimant file such.

On January 2, 1974, Claimant entered the hospital where a myelogram was performed. Thereafter he was discharged from the hospital and returned on or about January 7, 1974. Surgery in the form of an anterior cervical disc rfemoval and fusion

was performed on Claimant on January 9, 1974. He remained in the hospital about 5 days.

The record is unclear why, but apparently because of Claimant's hospitilization, Employer filed a BEC Form 202 on January 4, 1974, - Employer's First Report of Accident or Occupational Illness - (C-2), which is a more complete form than the abbreviated document Form 202a, filed earlier on December 13, 1971. Also, on January 8, 1974, Employer filed BEC Form 207, - Notice to Deputy Commission That Claim Will Be Controverted - (C-3). The stated reason for the controversion being that Claimant "did not file a written claim for compensation within one year from the date of injury."

After discharge from the hospital Claimant wore a neck brace and when he returned to work on March 17, 1974, he was

assigned to light duty. The neck brace was removed in July 1974. In the interim, on April 5, 1974, Claimant filed a Form BEC-203 - Employee's Claim For Compensation.

From December 10, 1970 to December 9, 1971, Claimant earned $9,125.24 (E-1), for an average weekly wage at the time of the accident of $175.48. In 1972 he earned $12,047.40 (E-2) and in 1973, $12,214.87 (E-3).

Claimant's medical condition has improved since his surgery. The thrust of his position concerning disability, however, is that as a result of the injury, his right arm remains weak, and his earning capacity in the open labor market remains impaired because, among other handicaps, he would have difficulty climbing, handling tools or doing heavy work.

X-rays of Claimant's cervical spine taken immediately after the accident were

normal with disc spaces preserved. Claimant was never free from pain following the accident and I am persuaded to the finding that his condition was patent and obvious to him. I also find it to be a fact that Claimant's ultimate condition which required surgery was not a latent one, but rather the natural progression from the original trauma to the subsequent disc degeneration.

II

Section 13(a) of the Act, (hereinafter sometimes referred to as the Section) in effect at the time of Claimant's accident and injury, provides in pertinent part that "The right to compensation for disability under this chapter shall be barred unless a claim therefore is filed within a year after the injury. . . ."

At this juncture, some comment may be appropriate concerning the applicability of

the presumption set forth in Section 20(a) of the Act. This provides that in a proceeding for the enforcement of a claim it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provision of the Act. The writer is not unaware of those cases which place the burden upon the Employer of dispelling this presumption by substantial evidence,[1/] and that in so doing facts, not speculation, are required[2/] It is abundantly clear, however, that the presumption is not determinative and its only function is to "control the result where there is an entire lack of competent evidence" and when both sides put in

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1/ Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Mitchell v. Woodworth, 449 F.2d 1097 (D.C. Cir. 1971); Butler v. District Parking Management Corp., 363 F.2d 682 (D.C. Cir. 1969).

2/ Steele v. Adler, 269 F. Supp. 376, 379 (D.D.C. 1967).

evidence, "the issue must be resolved upon the whole body of proof pro and con."[3/] I find that both parties have produced substantial evidence and I therefore will consider the record in its entirety.

Claimant advances certain arguments in his brief in support of the proposition that the claim was filed prior to April 5, 1974. Admittedly, neither the Act nor the Regulations require a claim for compensation to be filed in any particular manner.[4/] After consideration of the authorities cited by the Parties I conclude the time of filing herein to be April 5, 1974.

The resolution of the issue concerning the timely filing of the claim, however,

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[3/] Del Vecchio v. Bowers 296 U.S. 280, 286-287 (1935); Boyle v. Dupont Plaza Hotel, BRB No 124-73 (November 5, 1973).

[4/] Walker v. Rothschild International Stevedore Company and American Motorist Insurance Company, BRB No. 121-73 (January 25, 1974).

hinges upon the meaning to be attributed to the word "injury" as used in Section 13(a). The thrust of Claimant's position, as I understand it, is that the one year time limitation runs not necessarily from the date of the accident but rather from that date where the Claimant first became aware that the trauma sustained on December 9, 1971, may result in some disability. Or stated another way, the time limit runs from date when Claimant first becomes aware he has a compensable injury.

The cases advanced by the Parties in support of their respective parties have been read with considerable interest. In support of his thesis Claimant relies upon a somewhat analogous case where in significant part is stated:

> . . . 'injury' should encompass physical harm of a kind unknown to the employee at the time of the accident but which in later revealed, such as an occupational

> disease or latent wound. . . .In short, once a man has been put on the alert (i.e. once he knows or has reason to know) as to the likely impairment of earning power, there is an 'injury'; before that time, while there may have been an accident, there is as yet no 'injury' for claim or filing purposes under this statute.[5]

Therein rests the heart of Claimant's case.

The Section leaves little discretion to the trier of fact and that of law in the first instance. It's language is unambiguous and mandatory. It states succinctly that the right of compensation "shall be barred" unless a claim is filed with the stated time. The only exceptions provided in the Act, and which are not applicable herein, are those situations covered by Sections 13(b) (c) (d) and 30(f).

The Employer's brief contains copious citations in support of his position that,

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[5] Stancil v. Massey, 436 F.2d 274, 277 (D.C. Cir. 1970).

on the facts of this case, "a year after the injury" means one year after the accident. However, only a few of the authorities cited come to grips in a meaningful way with the problem herein.

Some years ago the Ninth Circuit Court, in which Circuit the instant injury occurred, had an opportunity to decide a case[6/] with remarkably similar facts to that herein. There the Claimant asserted that an acromo-clavicular dislocation had been overlooked originally and not recognized until surgery was performed some 19 months after the accident. After reviewing the "external and internal" injury concept advanced by Claimant and the appropriate law, the Court held that it is from the date of the injury and not the date when incapacity develops, that the time limit is

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6/ Kobilkin v. Pillsbury, 103 F.2d 667 (9th Cir. 1939), aff'd without opinion, 309 U.S. 619 (1940).

reckoned. The Court also found that "injury" is not tantamount to "disability" stating:

> It [the injury] was inflicted at the time of the accident, not when its full extent was first noted at a later time. . . . It was the manifest Congressional intent to deny compensation in all cases of disability arising from accidental injury unless claim is filed within the time limited. No provision is made for exceptional cases.

103 F.2d 670 (emphasis supplied).

In a concurring opinion, Circuit Judge Mathews was of the following view:

> . . .The fact, if it be a fact, that he did not discover his injury until January 19, 1937, is immaterial. As used in the [Act] the phrase 'one year after the injury' means just that. It does not mean one year after the Claimant's discovery of the true nature of the injury. The Act says nothing about discovery.

103 F.2d 671.

The contention that "injury" is to be equated with "disability" was laid to rest by the Supreme Court when it stated "Congress meant what it said when it limited

recovery to one year from the date of injury and 'injury' does not 'disability.'"[7] In that matter, four Claimant's cases were combined with the Court rejecting the argument that the limitation should not run until the injury becomes compensable, noting specifically that neither a latent injury or occupational disease was involved. As set forth in the opinion of the Ninth Circuit Court of Appeals[8] pertinent facts were as follows:

> No. 12,644. Claimant Johnson on May 12, 1947, struck his head on a crossbeam of a vessel while working as a welder, "sustaining extensive strain of the muscles of the neck which still continues painful." His employer continued him in lighter work in a partially disabled condition without reduction in wages until May 15, 1948. He lost no time from work as a result of the injury until about June 15, 1948. Throughout the period in question he was furnished by his employer with

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[7] Pillsbury v. United Engineering, 342 U.S. 197, 200 (1952).

[8] 187 F.2d 987, 988 (1951).

medical treatment. His claim for compensation was filed January 17, 1949.

No. 12,645. Claimant Curnutt, on the 18th of February, 1947, while performing services as a sheet-metal worker in ship repair operations sustained personal injury resulting in disability as follows: While lifting a heavy object, he wrenched his back. He was disabled from work for six days, after which he was continued in lighter work at full wages until his employment was terminated Jaunary 13, 1948. He did not lose wages in excess of seven days until February 5, 1948. His claim for compensation was filed January 17, 1949. Medical treatment was furnished him by the employer throughout the period.

No. 12,646. Claimant Shallat on November 21, 1947, while performing services as a longshoreman on a vessel sustained personal injury resulting in disability as follows: He caught his left hand between a sling and a bight, causing a contusion of the left hand, and exacerbation of a pre-existing progressive arthritis of the proximal joint of the second or middle finger. Apparently he lost no time because of the injury and continued at work. It does not appear from the findings whether he received medical treatment at the expense of his employer.

His claim for compensation was filed May 23, 1949.[9/]

No. 12,647. Claimant Manos on December 22, 1947, while performing services as a welder in the repair of a ship, sustained personal injury resulting in disability when he was struck on top of the head by an iron bar falling from above, suffering strain of the musculature in the cervical region. Following the injury he continued at his regular occupation as a welder without loss of time or wages until January 31, 1949, at which time, because of the condition of the condition of his neck, he was forced to discontinue working as a welder and seek other and lighter employment. Throughout the employer furnished him with medical treatment. His claim for compensation was filed August 17, 1949.

Issues were raised in each of the above cases concerning the timely filing of

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[9/] In the District Court opinion it is noted: "Claimant Shallat continued to perform the same duties following his injury as he had before. But, if his statements to examining physicians are accepted and true, he was in constant pain. The Compensation Act does not deny relief to an injured workman until his pain exceeds endurance." United Engineering v. Pillsbury, 92 F. Supp. 898, 901 (N.D. Calif. 1950).

claims but in each case the claim was allowed by the Deputy Commissioner. On appeal to the United States District Court the four cases were consolidated and the Court, in reversing the Deputy Commissioner stated:

> All four of the present claimants have been disabled within the meaning of the Longshoremen's and Harbor Workers' Compensation Act since the day they were injured. Consequently they had compensable claims. Such claims were not timely filed. It follows that the awards of the Deputy Commissioner were not within his power to make. The court is aware of the well established rule that the Deputy Commissioner's findings of fact should not be disturbed if there is any substantial evidence to support them. But his conclusion that these claimants suffered no disability until long after they were injured is based on an error of law. The undisputed factual record shows that the earning capacity of these men was impaired from the time of injury.
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> The delay in the filing of these claims is wholly understandable. None of these claimants appear to have been fully aware of his rights and obligations under the Compensation Act. And, even had these men

> realized the consequences of delay, it is only natural that they should hesitate to jeopardize their opportunity to continue working at their former wage rate by pressing claims for compensation. In a relatively short time the wages of these claimants would have equaled the maximum awards they could ever hope to receive. These, however, are considerations for the lawmakers and not for the Courts.10/

The decision of the United States District Court rejecting the claims was affirmed by the Ninth Circuit Court of Appeals which stated:

> We may observe in passing that the injured men appear to have suffered a disability of greater or less extent from the outset. Two of them, at least, as the Commissioner found, had to put on lighter work, and all of them confessedly continued from the time of injury to suffer pain and discomfort from it. It is true they lost no time, or none in excess of seven days anyway, and were paid their old wage, but those facts alone do not spell absence of disability for which an award may be made. See Twin Harbor Stevedoring & Tug Co. v. Marshall, 9 Cir., 103 F.2d 513 where this court sustained as award under like

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10/ Ibid.

> circumstances, saying that wages received by a worker who has suffered an injury are not conclusive and that ability to earn is the test. . . .
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> In the Kobilkin case, supra, the claimant was disabled from work for a period of three weeks following his injury, for the allowable portion of which time compensation was voluntarily paid him. He then resumed his employment at the former wage and continued to work for 17 months, when his condition worsened and it was learned that his injury was more extensive than had originally been thought. Later he filed a claim. Deputy Commissioner Pillsbury disallowed it because not filed within one year from the last payment of compensation as provided in §13(a). We upheld the ruling and the Supreme Court affirmed without opinion, 309 U.S. 619, 60 S.Ct. 465, 84 L.Ed, 983. Answering an argument somewhat analogous to the one made here, we said that the injury "was inflicted at the time of the accident, not when its full extent was first noted at the later time."11/

In an earlier case in the Circuit Court for the District of Columbia, in which a Claimant had received erroneous

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11/ Supra, note 8, at 989.

medical advice concerning his injury, it was stated: "We think that 'injury' is here equivalent to 'compensable injury' and that the limitation did not begin to run until the claim for compensation arose. . . ."[12/] However, as noted above this concept was rejected in United Engineering, supra.

We are not dealing herein with a occupational disease case where it was determined judicially that the time limitation begins to run when the "employee knows, or reasonably should know, that his condition is a disease which arose out of his employment."[13/] Significantly, the Court mentioned in passing that:

> It is important to note that we are not dealing in the instant case with an injury producing a latent disability or more serious consequences than was at first anticipated. . . . In such circumstances, clearly, the limitation period for compensation

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12/ Great American Indemnity v. Britton, 179 F.2d 60, 61-62 (D.C. Cir. 1949).

13/ Aerojet-General Shipyards, Inc. v. O'Keefe, 413 F.2d 793, 795 (5th Cir. 1969).

> application runs from the date of the injury and not the date when other consequences of the injury began to be manifested.14/ (emphasis supplied)

It is urged by Claimant herein that Stancil is the controlling law. However, there are important differences between that case and the instant matter. In Stancil the Court stated in pertinent part:

> . . .This happens to be a case in which the wrong diagnosis had the opposite effect of lulling the workman into quiescence. Again we are not dealing with an injury producing more serious consequences than first anticipated. . . . We hold for the employee, not because his injury turned out to herniated disc rather than strain, but because all the time it was thought to be a strain the claimant had the best of reason (the advise of carrier's doctor) for considering himself not in fact reduced in working power.15/ (emphasis supplied)

There a treating orthopedist admitted that perhaps the Claimant was misled

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14/ Ibid.

15/ Supra, note 5, p. 279.

concerning his condition. Running as a thread through Stancil is the concept that Claimant's medical condition was misrepresented to him. Little is to be gained, however, and it would only burden the decision to engage in a semantic struggle concerning latent v. patent or internal v. external injuries. It is sufficient to note that Stancil appears to rest upon the dual premises that Claimant had a latent injury coupled with being deceived by the medical opinion.

Claimant herein however, did not have a latent condition. Rather, he had an injury which produced more serious "consequences than first anticipated." Nor is there any evidence in the record that Claimant was misled medically. Therefore, Stancil is not controlling and the instant matter must be decided on its own facts.

The right of Claimant to future medical care is not involved herein. It

has been held for some years that medical care does not constitute "compensation" and that the limitations of the Section apply only to the payment of compensation and not to medical care.16/

Section 13(a) is designed to limit, not extent actions. We must indulge in the presumption that the legislature was aware that there may be some instances where otherwise meritorious claims would be barred by the lapse of time. Congress could have made allowance in the language of the Section for exceptional cases17/ but it did not choose so to do.

The Claimant herein was aware immediately of his injury and its relationship to

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16/ Marshall v. Pletz, 317 U.S. 383 (1943)

17/ This was done in limited extent in 1972, when the Section was amended by adding the following sentence: "The time for filing a claim shall not begin to run until the employee. . . is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury. . . and the employment."

the accident. He received medical treatment and suffered continuous pain. The Act does not require a Claimant to file a claim for a specific, identificable medical condition. Nor does it demand that a Claimant give a diagnosis of the condition from which he is allegedly suffering.

Is the word "injury" to be construed as "meaning the accident which caused the injury, or the injury resulting from the accident. . . .?"[18/] But as one Court queried, "how far is it proper to read words out of their literal meaning in order to achieve their alleged overriding purpose?"[19/] Where, as here, claimant experienced continuous pain, (one of the

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18/ Di Giorgio Fruit Corporation v. Norton, 93 F.2d 119, 122 (3rd Cir. 1937).

19/ Employers Mutual Liability Insurance Company v. Arrien, 224 F. Supp. 110, 113 (N.D. N.Y. 1965).

clearest indicia of an injury), and which pain was associated with the accident from the outset in the Claimant's mind, he had an "injury" and was obliged to file his claim within one year of the accident. To hold otherwise would mean that in similar cases the statute of limitations would not begin to run until the pain exceeded a Claimant's stoicism or tolerance or when an additional symptom developed. The Section is designed principally to prevent a workman from dawdling away his time for filing a claim. He cannot sleep on his rights. Here, where the pain was continuous the Claimant knew, or should have reasonably known, that his condition was worsening and that something was awry in his physical frame. Under the facts herein "injury" means the date of accident.

There is yet another reason why the accident date must be considered the date

of injury in this case. The writer can see no significant difference between the fact picture of Claimant's Shallat and Manos in United Engineering supra, and that of Claimant herein. Assuming, without conceding, the correctness Claimant's thesis that the time limitation runs from the date of disability, the claim would still be barred under United Engineering. There the District Court was of the opinion that Claimants were disabled within the meaning of the Act since the day of injury and thus had a compensable claim,[20/] and the Circuit Court noted they suffered a disability from the outset.[21/]

Claimant herein returned to his duties after the accident and though in pain was not assigned to lighter work. The degree

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20/ Supra, note 9, p. 901.

21/ Supra, note 8, p. 989.

of pain he experienced, however, interfered with his full earning capacity as it was only with discomfort that he was able to do his normal chores. It is reasonable to conclude that because of the pain his wage-earning capacity in the open labor market was impaired from the time of the accident to the time of his surgery.

Upon either, or both, of the aforementioned grounds the claim was barred by Section 13(a) of the Act. Having reached such a determination it is not necessary to decide the issue of Claimant's disability.

From the foregoing Findings of Fact, Conclusions of Law and the evidence contained in the record as a whole I make the following:

ORDER

The Claim for compensation by Norman G. Allan under the Longshoremen's and Harbor

Workers' Compensation Act against Todd Shipyards Corporation and the Travelers Insurance Company is hereby denied.

APPENDIX D

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judge

In the Matter of	
NORMAN C. ALLAN Claimant	
v.	Case No. 74-LHCA-291
TODD SHIPYARDS CORPORATION Employer	Formerly No. 14-15946
THE TRAVELERS INSURANCE COMPANY Carrier	

Dated: January 27, 1975

Filed: January 31, 1975

Before: Frank W. Vanderheyden
Administrative Law Judge

ERRATA

In the Decision and Order of the subject matter dated January 20, 1975, the following correction is noted.

Page 16, line 17, should read "pain was continuous the Claimant knew, or should have"

APPENDIX E

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

NORMAN C. ALLAN Claimant-Petitioner	)	
v.	)	BRB No. 75-121
TODD SHIPYARDS CORPORATION and THE TRAVELERS INSURANCE COMPANY Employer/Carrier-Respondents	)	DECISION
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party in Interest	)	

Dated and Filed: October 15, 1975

Appeal from the Decision and Order of Frank W. Vanderheyden, Administrative Law Judge, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Miller, Member:

This is an appeal by the claimant seeking review and reversal of a Decision and Order (74-LHCA-291) of Administrative Law Judge Frank W. Vanderheyden dated January 20, 1975, denying his claim for compensation. The claim was filed pursuant

to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (hereafter referred to as the Act).

On December 9, 1971, claimant, while working as a leadman in the hold of a ship, was struck on the head and right shoulder by a steel plate weighing approximately ten pounds. Claimant was wearing a hardhat at the time of the incident. The accident occurred in the course of his employment, and, although claimant experienced immediate pain and dizziness, he was not rendered unconscious by the blow. After being given aspirin at the employer's first aid station, claimant returned to work for the rest of the day. The pain in his head and neck persisted, however, and the following morning claimant was sent to see Dr. Irving Tobin, who diagnosed claimant's condition as post contusion occipital headache and cervical myositis. X-rays of the cervical

spine were normal, and Dr. Tobin gave claimant a prescription for medication to relieve headaches and pain. Claimant testified that the doctor informed him that he had suffered a bad bruise which would go away in time.

Claimant continued to work but his pains persisted, and he saw Dr. Tobin a second time in July 1973. Claimant was again told he had nothing more than a bad bruise. Finally, in November 1973, additional x-rays taken by Dr. Tobin revealed a change between the fifth and sixth cervical vertebrae. Claimant was referred to Dr. John C. Gibson, a neurosurgeon, who, in December 1973, diagnosed the condition as progressive cervical spondylosis brought about by the blow to claimant's head in December 1971. Surgery in the form of an anterior cervical disc

removal and fusion was performed on claimant in January 1974. A claim for compensation under the Act was formerly filed on April 5, 1974.

The administrative law judge dismissed the claim holding that it was not timely filed pursuant to Section 13(a) of the Act. 33 U.S.C. §913(a). The claimant appeals contending that the administrative law judge erred as a matter of law and that there was timely assertion of a claim for a latent injury, first correctly diagnosed in December 1973. We agree with claimant's contention.

Section 13(a) of the Act states:

> Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred unless a claim therefor is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation

> district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment. (emphasis added).

The "injury" in this case is progressive cervical spondylosis, correctly diagnosed by Dr. Gibson in December 1973 and occasioned by the accident claimant suffered in December 1971. Until Dr. Gibson's diagnosis, claimant had acted reasonably in seeking treatment for his pains from Dr. Tobin; in relying on Dr. Tobin's twice-rendered opinion that he had sustained nothing more than a bad bruise that would pass in time without lasting effect; and in believing that he had not suffered an injury that would diminish his wage earning capacity. "Workmen should not be required to overrule conclusions of the employer-designated medical experts, and

to insist that the doctors are wrong." Stancil v. Massey, 436 F.2d 274, 278 (D.C. Cir. 1970).

On the basis of all he had been told prior to December 1973, claimant had no reason to file a claim for compensation under the Act, and it was not until the diagnosis of cervical disc disease that claimant sustained an "injury" within the meaning of Section 13(a).

The Board adheres to the sound reasoning put forth by Professor Larson in his treatise on workmen's compensation:

> The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease.

3 Larson, The Law of Workmen's Compensation, §78-41 at 47 (1973).

To hold otherwise would lead to harsh and incongruous results in those cases where the true nature and seriousness of an

injury is not evident to either the claimant or his doctor during the claims period. It is illogical and unjust to require a claimant to file a claim within a year of the accident when the injury itself does not exist in compensable degree, and the Act does not so require.

Relying on Pillsbury v. United Engineering, 342 U.S. 197 (1952), the administrative law judge correctly held that, pursuant to Section 13(a), the filing requirement of one year from the date of "injury" does not mean from the date of "disability" (a medico-economic term under the Act). However, the administrative law judge erred in holding that this case does not involve a latent or unknown injury and, therefore, that Stancil v. Massey, supra, is inapplicable. In that case, claimant injured his back in 1959. His condition was diagnosed as a mild back sprain; he was treated for this condition for several

months and then informed he had no further disability. However, recurrent back pains forced claimant to seek further treatment in 1961 and again in 1962. Finally, in 1962, it was discovered for the first time by both the claimant and his doctor, that claimant was suffering from herniated discs caused by the 1959 accident. In construing the term "injury" for the purpose of determining the commencement of the statute of limitations under the Act, the court stated:

> We think that the canon of liberal construction. . .instructs that "injury" should encompass physical harm of a kind which is unknown to the employee at the time of the accident but which is later revealed. . . .[T]here is no intimation that Congress, contrary to its humanitarian aim, wished to penalize the employee who reasonably does not know that he has suffered harm which will, or may well, reduce his earning capacity. In short, once a man has been put on the alert (i.e., once he knows or has reason to know) as to the likely impairment of his earning power, there is an "injury"; before that time, while there may

> have been an accident, there is as yet no "injury" for claim or filing purposes under this statute.

436 F.2d at 277.

Similarly, claimant in this case suffered continuous pain after the accident; was told by the employer's doctor that his injuries were minor; and was later found to have suffered far more serious injuries than were originally diagnosed. Under such circumstances, claimant was not "injured", and the time for filing a claim under the Act did not begin to run, until he became aware of the full character, extent, and impact of the harm done to him.

Accordingly, the Decision and Order appealed from is reversed, and the case remanded to the Office of the Chief Administrative Law Judge for further appropriate action.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TODD SHIPYARDS CORPORATION & THE TRAVELERS INSURANCE COMPANY, Petitioners, vs. NORMAN C. ALLAN, AND THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondents.	)	No. 75-3442 ORDER

May 14, 1976

Before: HUFSTEDLER and SNEED,
Circuit Judges

Upon due consideration, the motion to dismiss is granted. The motion for extension of time to file a reply brief is denied. No final order subject to review has been entered. This court has no jurisdiction to entertain the appeal. (E.g., Gulfport Shipbuilding v. Vallot, 334 F.2d 358 (5th Cir. 1964); Sun Shipbuilding v. Benefits Review Board, __ F.2d __ (3d Cir., Mar. 25, 1976, #75-1715).

APPENDIX G

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	
NORMAN G. ALLAN Claimant v. TODD SHIPYARDS CORPORATION Employer	CASE NO. 74-LHCA-291 OWCP NO. 14-15946
THE TRAVELERS INSURANCE COMPANY Carrier	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Party in Interest	

Dated: June 29, 1977

Filed: July 12, 1977

Before: JOSEPH A. MATERA
Administrative Law Judge

DECISION AND ORDER

Jurisdictional and Procedural History

This proceeding involves a claim for compensation under the Longshoremen's and Harbor Workers' Act, as amended, 33 U.S.C. § 901, et seq. (hereinafter referred to as

the Act), for an injury sustained on December 9, 1971. The claim was originally denied after a hearing before an Administrative Law Judge on January 30, 1975, on the basis that it was barred by time limitations imposed by section 13(a) of the Act. The case was appealed to the Benefits Review Board (hereinafter referred to as Board) by claimant. On October 15, 1975, the Board reversed the Decision and Order of the Administrative Law Judge and remanded the case to the Office of the Chief Administrative Law Judge for further appropriate action. A further appeal to the United States Court of Appeals was dismissed on May 14, 1976, on the basis that there was no final order subject to review. The remaining issues to be resolved are the nature and extent of claimant's disability arising out of his accidental injury and the claimant's average weekly wage.

A formal hearing was held on May 18, 1977, in Seattle, Washington. The claimant, Solicitor of Labor and the employer-insurer were represented by counsel and were afforded full opportunity to be heard, to produce relevant evidence, to call, examine and cross-examine the witnesses, to make all arguments and to submit post-hearing briefs.

Findings of Fact and Conclusions of Law

Claimant at the time of the hearing was forty-four years of age and had an eighth grade education, later receiving his high school equivalency while in the Air Force. His work experience during his adult life has been primarily of a manual nature involving occupations requiring heavy labor. Claimant's occupation since April 1968 has been that of a shipwright, primarily for respondent. Claimant began this work at the primary level of a journeyman and later progressed to being a

leadman. At the time of hearing he was a shipwright-quarterman, being promoted to this supervisory position in November 1973. The nature of available work and the size of his crew determined whether the claimant's duties were purely supervisory or required him to "work the tools" as a leadman. On occasion, lack of available work required his further demotion to the journeyman level, performing manual carpentry work.

On December 9, 1971, claimant while working as leadman was injured when a ten-pound piece of steel plate fell from the deck of a ship into the hold where he was stationed, striking him on his hard hat and right shoulder. As a result of this incident claimant experienced chronic pain in his head, neck and upper extremities. Early considerations of surgery were rejected and a long period of conservative treatment was instituted by claimant's

treating physicians. However, this conservative course of treatment failed to relieve his symptoms of pain. As a result, claimant submitted himself to surgical intervention to relieve the degenerative disc condition of his cervical spine arising out of his injury, this taking place in January 1974.

Claimant, after a period of hospitalization and recovery at home, returned to work on March 17, 1974. It was stipulated by the parties that claimant was totally disabled from January 2, 1974 until March 17, 1974 (TI. 7). During this period following his injury, claimant continued his employment with respondent with little time lost from work other than for his hospitalization and recovery period following surgery. His attention to his employment, his skill and standard of performance were such that in November of 1973 he was promoted to the more supervisory position

of quarterman, which he continues to hold up to the present time. On August 5, 1975, claimant was struck on the back and neck by a falling tripod at work for which he received minimal treatment, returning to work the next day. The only other unrelated conditions causing him to lose time from work were a wrist burn in February 1976 and a hernia in October of the same year.

Looking firstly at the issue of claimant's alleged loss of wage-earning capacity, the thrust of his argument is that as a result of his injury he has continued symptoms of pain in his neck and arms, particularly with lifting activities involving any motions overhead. He testified to an inability to perform work duties involving extended handling of tools or heavy work. While he has been able to continue his duties as quarterman, he argues that his present position is subject

to lack of predictability as to the level of available work in the shipbuilding industry to assure his continuance as a quarterman. Since he is no longer able to work in the lower level positions of journeyman or leadman, because of the manual duties he would be required to perform, claimant contends that he has sustained under the Act a loss of wage-earning capacity which entitles him to an award.

The medical reports of examining and treating physicians support claimant's testimony concerning his physical impairments. The uncontradicted testimony of Dr. John A. Burrell, whose practice is primarily in the area of industrial medicine and surgery, was to the effect that claimant has suffered a permanent partial loss of twenty-five percent of the function of each arm arising out of his limitations of working overhead and inability to lift more

than twenty-five pounds without adverse effects. He similarly felt that claimant had a permanent partial impairment of twenty-five percent on the whole body standard. He felt the claimant should not work in any job requiring him to reach overhead or to lift more than twenty-five pounds. He further stated that he felt the incident of August 1975 when claimant was struck by a tripod produced no change in his impairment.

These medical conclusions were supported by the testimony of a vocational expert, Frank Swinehart. This witness testified that claimant would not be able to perform his previous jobs as a construction laborer or as a shipwright, with the exception of the quarterman job he presently has, because of his physical limitations.

Respondent counters with the exhibited ability of the claimant to perform his

present job as quarterman since his promotion in November 1973 and the fact that this position was earned by claimant because of his skills as a valued employee. They further contend that the probability of claimant being demoted from his position as a quarterman to a leadman or journeyman where he would have to perform manual duties is extremely doubtful in view of his proven value in his present position and the company's positive future prospects for his continued need in his present job.

Based upon these factors primarily, respondent vigorously argues that claimant is in no manner disabled from performing his present duties as a quarterman and has suffered no economic disability whatsoever. To the contrary, respondent argues that claimant's wage-earning capacity has increased. In support of this argument, respondent presented extensive testimony from its assistant director of personnel

concerning the value and high regard of claimant as an employee as well as the positive future employment prospects for the company.

It is well settled, however, that increased earnings after an injury do not preclude an award for disability. The factor of claimant's ultimate promotion and higher earnings as a quarterman have been considered but are not conclusive as to his wage-earning capacity. As the Board clearly set forth in the recent case of Scott v. Trans World Airlines, Inc., 5 BRBS 141, 143, et seq. (December 6, 1976):

> Wages received on returning to work are indicative, but not alone determinative, of wage earning capacity. Kendrick v. Bethlehem Steel Corp., 3 BRBS 164, BRB No. 75-232 (January 9, 1976). Claimant's earning capacity must be gauged on his ability to earn wages in the open market, not on the wages actually received. Silberstein v. Service Printing Co., 2 BRBS 143, BRB No. 75-144 (August 14, 1975). In addition the administrative law judge must look to the future for factors that might affect the

> claimant's capacity to earn wages in a physically disabled condition. He should also consider the possibility that claimant might lose his job. Thus, the availability of similar employment for a person in claimant's physical condition must be considered. Sursum Corda, Inc. v. Cooper, 1 BRBS 60, BRB No. 74-113 (August 6, 1974).

As pointed out in the Scott case, supra, section 8(h) of the Act reads that the effect of various factors which may affect a claimant's capacity to earn wages in his disabled condition should be considered "including the effect of disability as it may naturally extend into the future."

In the subject case claimant's injury has concededly resulted in an impairment of claimant to perform work as a shipwright which would require use of the tools, particularly in overhead work or in lifting. While such tasks are not normally required in claimant's present primarily supervisory position of quarterman, respondent's own witness from its personnel

department conceded that claimant's chances of retaining employment as a quarterman are less secure than if he were unrestricted physically. (T. II 75, 87). While respondent's evidence concerning its future full employment prospects was impressive, nevertheless, it was also conceded that the shipbuilding industry was a "cyclical industry" and it was conceivable that claimant would be required to do physical work with the tools if employment reached certain lower levels.

Here the claimant's primary employment for years until November 1973 required physical exertions which the evidence established he can no longer perform. While his present supervisory position generally excludes such activity, there is no future guarantee that he will not be reduced in position to a leadman or even journeyman Claimant's past experience has included moving "up and down" in various

positions as the work required, an ability his physical condition no longer allows. Admittedly, this physical impairment makes his future employment more vulnerable, as respondent's witness conceded. Considering his limited previous vocational experience as a heavy manual worker and the nature of his physical impairments, limiting his ability to secure future employment because of the restrictions under which he must be employed; and finally, resolving all doubts in claimant's favor, the record provides support for a twenty-five percent permanent loss of wage-earning capacity under section 8(c)(21) of the Act.

In respect to his permanent partial disability, a further issue in this case concerns the average weekly wage of the claimant at the time of his injury; a matter on which evidence, both testimonial and documentary, was received at the original hearing of this matter in October

1974 as well as at the subject hearing. At the outset of the subject hearing a stipulation in this respect was entered into but later withdrawn by counsel for claimant during the hearing. After consideration of all of this evidence I conclude that the employment of the claimant at the time of his injury was both regular and continuous during substantially the whole of the year immediately preceding his injury. The evidence further indicates that his earnings in the year immediately preceding his injury were $9,125.24. Utilizing this figure in accordance with section 10(a) of the Act, the average weekly wage of the claimant to be utilized in computing his proper amount of compensation award would be $175.46.

Claimant's counsel has submitted a request for counsel fee and costs which apparently include time expended by him for the appeal to the Benefits Review Board,

following the initial unfavorable decision by Administrative Law Judge Frank W. Vanderheyden on January 20, 1975. Under the Act and appropriate regulations implementing the Act application for legal fees and costs are to be made to the administrative body or court before whom the services were performed. (See sections 28(c) of the Act and 702.132 of the Code of Federal Regulations.) Counsel should therefore resubmit his fee application upon receipt of this Opinion and Order, with a copy to respondent's counsel for comment, setting forth the time spent. He may appropriately include in this modified fee application services provided the claimant through the time of the original hearing and opinion by Judge Vanderheyden as well as for services provided following the remand by the Board up to and through the date of this Decision and Order. An appropriate fee will be awarded by way of a Supplemental Order.

Any representation provided before the effective date of the Amended Act, November 26, 1972, should be indicated, so that appropriate determination of respondent's liability can be assessed. Expert fees and costs for the relevant periods may also be included for consideration. Any fees for representation relative to the appeal to the Board must of course be directed to that administrative body.

All computations provided for herein are to be made by the Deputy Commissioner in accordance with the terms of this Decision and Order and applicable provisions of the Act and Regulations. All computations set forth herein are subject to verification by the Deputy Commissioner.

Order

It is hereby ordered that:

1. Respondent shall pay the claimant compensation for a twenty-five percent permanent partial disability, compensable

under section 8(c)(21) of the Act based on an average weekly wage of $175.46 for the period from December 9, 1971 onward and as increased by all adjustments required by law including sections 6(b), 10(f) and 10(h) of the Act as appropriate to continue until further ordered.

2. Respondent shall pay the claimant for temporary total disability in accordance with the stipulation of the parties for the period of his hospitalization and recuperation from January 2, 1974 until March 17, 1974, at the appropriate rate established in accordance with paragraph one of this Order.

3. The respondent shall pay to the claimant interest at the rate of six percent on the balance of all compensation due to the claimant computed from the date each payment was due until the date of actual payment.

4. Respondent is entitled to credit, in paying all of the above-ordered benefits and interest, for all benefits previously provided to the claimant.

5. Claimant shall submit a modified application for fees and costs as described in this opinion.

APPENDIX H

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
	)	
NORMAN G. ALLAN	)	
Claimant	)	
	)	
v.	)	CASE NO.
	)	74-LHCA-291
TODD SHIPYARDS CORPORATION	)	
Employer	)	OWCP NO.
	)	14-15946
THE TRAVELERS INSURANCE COMPANY	)	
Carrier	)	

Dated: August 8, 1977

Filed: August 10, 1977

Before: JOSEPH A. MATERA
Administrative Law Judge

SUPPLEMENTAL DECISION ON MOTION FOR RECONSIDERATION, AND PETITION FOR ALLOWANCE OF ATTORNEY'S FEE AND COSTS

A compensation order in this case was dated June 29, 1977, and was filed in the Office of the Deputy Commissioner on July 12, 1977. The Motion for Reconsideration was received in this office on July 21, 1977, which is within 10 days of the date

the original Order was filed. It is therefore timely. General Dynamics Corporation v. Hines, 1 BRBS 3, (April 1, 1974).

The respondent raises a number of contentions in his motion. However, most of his arguments relate to the issue which was fully argued before me at the time of the hearing on May 18, 1977, concerning the nature and extent of the claimant's disability arising out of his accidental injury and the facts surrounding this issue. Respondent contends that there is a total lack of evidence to support the award granted to claimant in paragraph one of the Order. After a careful review again of the record and the arguments raised by counsel for respondent, it is concluded that the contentions of the respondent concerning the twenty-five percent award of permanent partial disability have all been answered in the original decision, and are

without merit. In respect to respondent's further argument regarding amendment of this paragraph of the Order, the date for commencement of the award was inadvertently and erroneously stated to be December 9, 1971, the date of the injury. It is amended to be January 2, 1974. In this same paragraph of the Order, general reference is made to all those sections of the Act concerning adjustments of an award, to be applied "as appropriate." While I am assured that only the appropriate provisions will be applied by the Deputy Commissioner in implementing the Order, in the interest of clarity references to sections 10(f) and 10(h) of the Act are deleted in that the claimant has been found <u>permanently partially</u> disabled only; references to 6(b) are to appropriate application of that section to claimant's date of injury which occurred on December 9, 1971.

As requested in the original Decision and Order, counsel for claimant has filed an amended petition for allowance of attorney's fees and costs, excluding any time or expense incurred with respect to review of the prior Order of the Benefits Review Board and proceedings in the Ninth Circuit Court of Appeals. Counsel also confirms that all of these attorney's fees and expenses have been incurred after November 26, 1972. Based upon the entire record, the application for attorney's fee and reimbursement of costs and my observations at the hearing, I find that the claimant's attorney, William J. Van Natter, Esquire, is entitled to receive from the employer and carrier the sum of $3,003.00 for attorney's fee and the further sum of $811.55 for reimbursement of costs. I find these sums to be reasonable for the legal services rendered to claimant and for

reimbursement of costs. In accordance with the provisions of section 28 of the Act, payment of this fee and reimbursement of costs are assessed against the employer and carrier.

APPENDIX I

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

NORMAN G. ALLAN Claimant-Respondent	)	
v.	)	
TODD SHIPYARDS CORPORATION	)	BRB No. 77-563
and	)	
THE TRAVELERS INSURANCE COMPANY Employer/Carrier- Petitioners	)	DECISION

Dated and Filed: July 21, 1978

Appeal from the Decision and Order of Joseph A. Matera, Administrative Law Judge, United States Department of Labor.

Before: SMITH, Chairman, and MILLER, Member.

MILLER, Member:

This is an appeal by the employer/carrier (hereinafter, the employer) from the Decision and Order and the Supplementary Decision on Motion for Reconsideration (74-LHCA-291) of Administrative Law Judge Joseph A. Matera pursuant to the provisions

of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (hereinafter, the Act).

The claimant, a 45 year old shipwright, whose previous work experience had been heavy manual labor, had been primarily employed since 1968, by Todd Shipyards Corporation. Claimant sustained injuries in December of 1971 to his head, neck and right shoulder when he was struck on his fiberglass hard hat and right shoulder by a ten pound piece of steel plate, which fell from the deck a distance of approximately 20 feet into the hold where he was working.

The claimant was treated several times immediately after the accident in December of 1971, by an attending physician retained by the employer. He was instructed that his injury was a bad bruise which would go away in time. Two years elapsed. Claimant sought little medical advice until increasing pain in his upper extremities,

while on the job, caused him to seek medical attention. A consulting surgeon diagnosed the claimant's condition as progressive cervical spondylosis initiated by a blow to the head. In January of 1974, the claimant had spinal surgery and subsequently filed a claim for temporary total disability. The employer paid benefits for temporary total disability during the hospitalization and two months of recuperation. Claimant returned to work wearing a neck brace in March of 1974. According to the record, the employer paid the claimant temporary total compensation for the claimant's 1971 back injury for the period commencing January 2, 1974 and ending March 17, 1974 in accordance with Section 8(b) of the Act. 33 U.S.C. §908(b).

In April of 1974, the claimant filed a claim for permanent partial disability for continued pain in his shoulders and upper extremities. The employer controverted the

claim asserting it was time barred under Section 13(a) of the Act. 33 U.S.C. §913(a).

Administrative Law Judge Frank W. Vanderheyden found that the claim was time barred by Section 13(a) of the Act. On appeal the Board reversed that decision and remanded the case for appropriate findings. The employer appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit which dismissed the appeal as interlocutory.

At the hearing on remand the issues raised were:

1) The nature and extent of disability,

2) Determination of claimant's average weekly wage under Section 10, and

3) Whether claimant sustained a loss in wage-earning capacity pursuant to Sections 8(c)(21) and 8(h) of the Act. 33 U.S.C. §§908(c)(21) & 908(h).

The claimant testified that he was unable to handle tools for extended periods and that he was unable to perform the heavy manual labor occasionally required by his supervisory duties. Medical testimony at the hearing indicated that the claimant was advised not to reach overhead or lift more than twenty pounds on the job, due to a permanent partial impairment to the whole body of twenty-five percent. The administrative law judge also heard the testimony of a vocational expert who had tested the claimant for occupational suitability.

The employer argued that the claimant had suffered no loss in wage-earning capacity because subsequent to the December 1971 accident, he had been promoted to a supervisory position and given a raise. It asserted that employment prospects for a supervisor shipwright at Todd Shipyards for the immediate future were excellent. The administrative law judge held that the

claimant's increased earnings and a promotion to a supervisory position were not dispositive of the issue of lost wage earning capacity. Applying Section 8(h), he considered the future effects of the claimant's injury on his employment and the claimant's work history at Todd Shipyards. He noted the shipyard's practice of requiring supervisory shipwrights to work "with the tools" as needed. The administrative law judge found a twenty-five percent loss in wage-earning capacity under Section 8(c)(21) and 8(h). Using Section 10(a), he found the claimant's average weekly wage to be $175.46 based upon earnings of $9,125.24 for the year immediately preceding claimant's injury. On the employer's motion for reconsideration, the administrative law judge affirmed his prior decision. The employer now appeals.

Employer contends on appeal:

1) That there was not substantial evidence on the record for a finding of a 25 percent loss in wage earning capacity resulting from the December, 1971 injury.

2) That the claimant's raise and promotion preclude a showing of lost wage-earning capacity.

3) That the administrative law judge erred in equating medical disability with lost wage-earning capacity.

4) That the administrative law judge improperly relied on the speculative testimony of the claimant's vocational expert witness, Frank Swinehart.

The Board's scope of review is limited to ascertaining whether there is substantial evidence in the record to support the award and whether the findings and conclusions based on that evidence are rational and in accordance with law. 33 U.S.C. §921(b)(3); O'Keefe v. Smith Associates, 380 U.S. 359 (1965).

Section 8(c)(21) and Section 8(h) of the Act govern the instant case. Section 8(c)(21), states:

> In all other cases in this class of disability the compensation shall be 66 2/3 per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise. . . .

Section 8(h) states:

> . . .That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

The administrative law judge concluded pursuant to Section 8(h), that the claimant's higher post-injury earnings did not fairly and adequately represent wage-earning capacity. We find that the record supports the fact that the claimant's post-injury wages are higher than his pre-injury average weekly wage, but it does

not preclude an award under Section 8(c)(21). A loss in wage-earning capacity may be found when the claimant is unable to perform some of the duties required of him. Hughes v. Litton Systems, Inc., 6 BRBS 301, BRB No. 76-483, (July 15, 1977). In this case the claimant holds his job at the employer's largesse. The claimant could be furloughed or fired in the future. Where an employer is beneficent and gives a disabled employee light work at the same or higher pay, such beneficence does not negate a finding of a loss in wage-earning capacity. United Fruit v. Cardillo, 104 F. Supp. 81 (2d Cir. 1952). A claimant's desire to be gainfully employed should not bar him from compensation for economic loss when he continues to work after becoming disabled. Schenker v. The Washington Post Co., 7 BRBS 34, BRB No. 76-286 (Nov. 30, 1977); Villarroel v. Campbell Industries, BRBS ___, BRB No. 77-350 (March 30, 1978).

Pain experienced on the job from a residual injury may also be considered in assessing a loss of wage-earning capacity, notwithstanding a claimant's insistence on continuing to work. Villarroel, supra.

The record clearly supports the administrative law judge's conclusion that claimant's post-injury earnings are not truly representative of his wage-earning capacity. As a result of his injury, claimant had surgery in January of 1974 for anterior cervical disc removal and fusion. The testimony of the claimant's treating physician, Dr. Burrell, was uncontroverted that the claimant had suffered a twenty-five percent permanent partial loss of function to each arm and a permanent partial loss of function of twenty-five percent to the body as a whole from the first injury.

Claimant also testified that he has pain in his neck and arms, particularly

when lifting. He also testified that when shipbuilding activity slowed down, quartermen and leadmen (supervisory personnel) were required to perform as journeymen. At the first hearing in October of 1974, he estimated that his former position as a journeyman required seventy-five percent heavy manual labor with his tools. The claimant also estimated that his present position as a quarterman required five to ten percent heavy manual labor with his tools.

Moreover, there was the testimony of a vocational expert, Frank Swinehart, that claimant would be unable to perform the tool working aspects of his duties, if he were required during frequent labor cutbacks to function again as a journeyman or leadman. Employer argues that this testimony is unreliable. However, as a vocational rehabilitation specialist who administered standardized tests to the

claimant, Swinehart could render a professional opinion on claimant's employment prospects. Moreoever, the administrative law judge stated that the medical evidence of disability was supported by Frank Swinehart's testimony that the claimant was no longer employable as a shipwright. It is clearly within the administrative law judge's province to accept or reject all or any part of the testimony according to his judgment. Perini Corp. v. Heyde, 306 F. Supp. 1321, 1325 (D. R.I. 1969).

The factors affecting the disabled claimant's ability to earn wages on the open market which support the administrative law judge's conclusion that claimant's post-injury earnings are not truly representative of his post-injury wage-earning capacity are the same factors that must be considered under Section 8(h) in establishing a new figure for claimant's post-injury wage-earning capacity.

However, the administrative law judge in the instant case rather than setting an actual figure for post-injury wage-earning capacity merely concluded claimant had a twenty-five percent permanent disability, and thus based the compensation award on twenty-five percent of claimant's pre-injury average weekly wage. "Where the administrative law judge makes a rough approximation of the amount of disability without reliance on the specific statutory scheme provided, we must remand for a redetermination of compensation benefits in line with the statutory wording." Belton v. Traynor, 381 F.2d 82, 85 (4th Cir. 1967); Lawson v. Atlantic and Gulf Grain Stevedores Company, 6 BRBS 770, BRB No. 76-467 (Nov. 30, 1978); Bennett v. Sun Shipbuilding and Dry Dock Company, 8 BRBS 212, BRB No. 77-511 (April 28, 1978). We note this figure is also the same as the percentage of claimant's degree of physical

disability found by Dr. Burrell. Therefore, an inference can be raised that the administrative law judge may have simply adopted this medical opinion as to disability. Basing lost wage-earning capacity solely on this figure, while appropriate in claims under the schedule, would be inappropriate in a claim falling under Section 8(c)(21). Van Dyke v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 388, BRB No. 77-873 (May 31, 1977).

The Board concludes there was substantial evidence indicating the claimant sustained a loss in wage-earning capacity although the administrative law judge's 25 percent figure was computed incorrectly. This finding is vacated and remanded for a redetermination of lost wage-earning capacity in accordance with Sections 8(c)(21) and 8(h), 33 U.S.C. §§908(c)(21) and 908(h), without equating that figure

with anatomical impairment. The finding that claimant's raise and promotion did not preclude a loss in wage-earning capacity is hereby affirmed. The administrative law judge's reliance on the testimony of the vocational expert witness was not in error.

APPENDIX J

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
	)	
NORMAN G. ALLAN	)	
Claimant	)	
	)	
v.	)	CASE NO.
	)	74-LHCA-291
TODD SHIPYARDS CORPORATION	)	
Employer	)	OWCP NO.
	)	14-15946
THE TRAVELERS INSURANCE COMPANY	)	
Carrier	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	)	
Party in Interest	)	

Dated: August 31, 1978

Filed: September 11, 1978

Before: JOSEPH A. MATERA
Administrative Law Judge

DECISION ON REMAND

This case is before me on remand from the Benefits Review Board (BRB No. 77-563). In its decision the Benefits Review Board (hereinafter referred to as Board) affirmed the finding that claimant had sustained a

loss in wage-earning capacity. The Board, however, felt that the 25 percent figure found by me to the extent of loss of wage-earning capacity was computed incorrectly in that the specific statutory scheme provided in sections 8(c)(21) and 8(h) of the Act was not specifically utilized in setting forth the amount of disability. In addition, the Board felt an inference could be raised that the medical opinion of Dr. Burrell was inappropriately the sole basis utilized in my finding of a 25 percent disability, in that this was the same figure arrived at by this physician in assessing claimant's degree of overall physical disability.

In light of the sameness in degree of disability cited by Dr. Burrell and the disability found in my own opinion, the Board's suggestion of possible inference that his opinion was simply adopted by me in coming to my decision is understandable.

However, this was not the intended basis of my finding of disability as a review of my decision indicates. In my original opinion, I recognized that section 8(h) of the Act requires consideration of ". . . the effect of various factors which may affect the claimant's capacity to earn wages in his disabled condition, 'including the effect of the disability as it may naturally extend into the future.'" (P. 5 of original opinion, citing at length Scott v. Trans-World Airlines, Inc., 5 BRBS 141.) In recognition of this factor for determining extent of disability, testimony which established claimant's future vulnerability to lay-offs because of his compromised physical condition was cited in the opinion. The limitations created by claimant's injury in terms of certain physical exertions he can no longer perform were further alluded to as undermining the security of his future employment in various positions

he has held for the respondent employer, including that of a quarterman, which was largely supervisory in nature. While the restricted activities, particularly those involving overhead work and lifting, were not normally required in this supervisory position, nevertheless testimony from respondent's own personnel department agent indicated that claimant's chances of retaining his employment in this position were less assured as a result of his physical restrictions. (T. II, p. 75, 87).

Thus, in reliance upon sections 8(c)(21) and 8(h) of the Act, I reaffirm my finding of a 25 percent loss of claimant's wage-earning capacity as a result of his injury. While I have taken Dr. Burrell's medical opinion of an overall 25 percent disability into consideration, my finding is based on those factors set forth in sections 8(c)(21) and 8(h) of the Act, and

not upon an equating of his anatomical impairment with loss of wage-earning capacity. In reaching this conclusion I have further taken into consideration claimant's limited education and work experience, referred to in the original opinion.

Computing claimant's loss of wage-earning capacity in accordance with the specific statutory scheme, as set forth in 8(c)(21) and 8(h) of the Act, in accordance with the Board's direction, I therefore firstly reaffirm claimant's average weekly wage at the time of the accident to be $174.46, a figure left undisturbed by the Board. Based upon a twenty-five percent disability, the difference between claimant's average weekly wage and his wage-earning capacity thereafter is $43.62. This figure is arrived at by application of the factors contained in section 8(c)(21) and 8(h) of the Act and the formula set out

therein. Sixty-six and two thirds per centum of this difference between claimant's average weekly wage and his wage-earning capacity thereafter in the same employment is $29.08, the weekly compensation to which the claimant is entitled as a result of the subject injury.

Computations set-forth herein are subject to verification by the Deputy Commissioner upon implementation of this decision.

APPENDIX K

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

NO. 78-539

In the Matter of	)	
	)	
NORMAN G. ALLAN	)	
Claimant-Respondent	)	DECISION
v.	)	and
TODD SHIPYARDS CORPORATION	)	OWCP NO.
Employer	)	14-15946
and	)	
THE TRAVELERS INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	

Dated and Filed: July 31, 1980

Appeal from the Decision and Order on Remand of Joseph A. Matera, Administrative Law Judge, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

Per Curiam:

This is an appeal by the employer/carrier (hereinafter, employer) from a Decision and Order on Remand (74-LHCA-291) of Administrative Law Judge Joseph A. Matera

pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (hereinafter, the Act).

The facts of this case are discussed in the decision issued by this Board on employer's appeal of Judge Matera's original Decision and Order. Allan v. Todd Shipyards Corp., 8 BRBS 570, BRB No. 77-563 (1978).1/ The Board affirmed the administrative law judge's finding that claimant sustained a loss in wage-earning capacity

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1/ The procedural history of this case is extensive. Claimant filed a claim for permanent partial disability in April 1974 which Administrative Law Judge Frank W. Vanderheyden found to be time-barred under Section 13(a) of the Act. 33 U.S.C. §913(a). Claimant appealed and the Board reversed and remanded the case for appropriate findings. Allan v. Todd Shipyards Corp., 2 BRBS 351, BRB No. 75-121 (1975). Employer then appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit, which dismissed the appeal as interlocutory. The case was subsequently heard by Judge Matera.

as a result of his injury. However, the Board also held that the administrative law judge erred in determining that claimant suffered a 25 percent decrease in wage-earning capacity rather than determining the dollar amount of claimant's post-injury wage-earning capacity as required by Sections 8(c)(21) and 8(h) of the Act. 33 U.S.C. §§908(c)(21), 908(h). The finding of a 25 percent loss in wage-earning capacity was the same figure as the extent of anatomical impairment found by Dr. Burrell, thus raising the inference that the administrative law judge simply adopted this medical opinion as to disability. We remanded the case, since it is inappropriate to base lost wage-earning capacity in a case arising under Section 8(c)(21) solely on a physician's evaluation of the degree of physical disability a claimant has

suffered. Van Dyke v. Newport News Shipbuilding and Dry Dock C., 8 BRBS 388, BRB No. 77-873 (1977).

On remand, the administrative law judge reaffirmed his finding that claimant suffered a 25 percent loss of wage-earning capacity as a result of his injury. He stated that his finding was based on the factors set forth in Sections 8(c)(21) and 8(h), and that he was not equating claimant's anatomical impairment with his loss of wage-earning capacity. Decision and Order, slip op. at 2.

Employer has appealed, contending that the administrative law judge's finding that claimant suffered a 25 percent loss in wage-earning capacity is not supported by substantial evidence. Employer further contends that because the award to claimant under Section 8(c)(21) is subject to modification pursuant to Section 22 of the Act, 33 U.S.C. §922, the effect of the

injury as it may naturally extend into the future should not have been taken into account in determining claimant's lost wage-earning capacity.

The Board's scope of review is limited. If the findings and conclusions of the administrative law judge are supported by substantial evidence, are not irrational, and are consistent with the applicable law, the order must stand. 33 U.S.C. §921(b)(3); O'Keeffe v. Smith Associates, 380 U.S. 359 (1965).

We turn first to employer's argument that a 25 percent loss of wage-earning capacity is not supported by substantial evidence. In the Decision on Remand, the administrative law judge specifically considered the factors in Section 8(h) of

the Act in determining claimant's wage-earning capacity.[2/] He considered the opinion of Dr. Burrell, the evidence concerning claimant's future vulnerability to lay-offs due to his disability, the limitations imposed upon claimant due to his physical restrictions, and claimant's limited education and work experience. The wage-earning capacity determined by the administrative law judge is reasonable in light of these factors. Fulks v. Avondale Shipyards, Inc., 10 BRBS 340, BRB Nos. 78-369A/B (1979).

[2/] Section 8(h) of the Act provides in part that if the administrative law judge finds that claimant's post-injury earnings do not reasonably represent his wage-earning capacity, the administrative law judge may determine a reasonable wage-earning capacity, taking into account the nature of the injury, the degree of physical impairment, and other relevant factors including the effect of the disability as it may naturally extend into the future.

Employer's contention that the administrative law judge should not have considered the effect of claimant's disability as it may naturally extend into the future in determining claimant's wage-earning capacity is clearly erroneous. This is one of the factors specifically set forth in Section 8(h). Devillier v. National Steel and Shipbuilding Co., 10 BRBS 649, BRB No. 78-278 (1979). Thus, the administrative law judge properly considered this factor.

In accordance with Sections 8(c)(21) and 8(h), the administrative law judge determined that the difference between claimant's average weekly wage of $174.46 and his wage-earning capacity was $43.62 and based the award of permanent partial disability on that figure. The administrative law judge's Decision on Remand is somewhat unclear; he did not specifically state that claimant's wage-earning capacity

was $130.84 but expressed it on a percentage basis. He did consider the appropriate factors, however, and made his award in accordance with the statutory scheme.

This is the third time this case has come before the Board. A remand for further clarification would not change the ultimate result in this case. Accordingly, the Decision and Order on Remand of the administrative law judge is affirmed.